Supreme Court, U.S.
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No. 85-867

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

WILLIE J. HODGES,

Petitioner,

– against –

DEPARTMENT OF TRANSPORTATION,
FEDERAL AVIATION ADMINISTRATION,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER

JOAN STERN KIOK
Counsel for Petitioner
32 Broadway - Suite 1800
New York, New York 10004
(212) 635-0700

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PRELIMINARY STATEMENT

This reply brief addresses arguments first raised in the brief in opposition and other intervening matter not available at the time of the filing of the petition.

REPLY TO ARGUMENTS RAISED IN BRIEF IN OPPOSITION

1. Contrary to respondent's argument (p. 5 of its brief), it is improper to draw an adverse inference from petitioner's failure to testify. Such an adverse inference may be drawn only after the agency has established a prima facie case. Adams v. Department of Transportation, FAA 735 F. 2d 488, 492 (Fed. Cir. 1984), cert. denied, No. 84-258 (Nov. 13, 1984).

In each of the four Merit Systems Protection Board cases cited in the petition (pp. 9-10, 14-16)[1], the Board found that the agency's failure to show that the

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1. The four cases are Carpenter v. Department of Transportation, Docket No. NY075281F1432, 17 M.S.P.R. 84 (MSPB 1984); Coleman v. Department of Transportation, Docket No. NY075281F0482ADD, 21 M.S.P.R. 596 (MSPB 1984); Ailes v. Department of Transportation, Docket No. NY075281F0842, 17 M.S.P.R. 114 (MSPB 1983) and Benson v. Department of Transportation, Docket No. PH075281F1021, 19 M.S.P.R. 596 (MSPB 1984).

notice of leave cancellation had been effectively communicated to the controller resulted in a failure to establish a prima facie case. Since, as we have shown in the petition, the agency introduced no evidence that petitioner had received notice of leave cancellation, the burden did not shift to the petitioner pursuant to Schapansky v. Department of Transportation, FAA, 735 F. 2d 477, 482-3 (Fed. Cir. 1984), cert. denied 105 S. Ct. 432 (1984). Moreover, petitioner had already denied, in his interrogatories, which the presiding official made part of the record, that he was aware of any facility order which required him to take action in the event of a strike. Since the only evidence of leave cancellation was the Chief's testimony that a notice had been placed in the "read and initial" binder more than six weeks prior to the strike

and there was no evidence that the petitioner had read or initialed the notice or received any other communication that leaves were cancelled, there was nothing for petitioner to rebut and no reason for him to take the stand.[2]

2. Although respondent (p. 3 of its brief) would have it appear that the full Board addressed the issues raised by petitioner when it denied review of the presiding official's initial decision, a careful reading of the Board's opinion and order (App. B., pp. 21-24) reveals that the Board did not deal with the issue at all. In footnote 2, the Board listed the numerous issues raised in the petition for review by the twenty-three controllers who were the appellants in the consolidated case. None of the issues involved

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2. The notice was not even introduced in evidence. Petitioner was not represented by attorney who might have advised him, as a precautionary measure, to testify.

the question of whether the June 16, 1981 notice was sufficient to cancel annual leave.

3. Petitioner is not relying, as respondent asserts (p. 5, fn. 3 of its brief) upon evidence contained in other records of other appeals to the Board. Petitioner is relying, as he is entitled to do, upon decisions of the Board which found that the same June 16th memorandum that was involved at the same TRACON facility as is involved in petitioner's case, was insufficient to communicate a cancellation of previously approved annual leave. The respondent itself, in numerous cases involving the air traffic controllers, has relied upon facts of general application adduced in certain "lead" cases. In this very case, it relies on the facts set forth in Campbell v. Department of Transportation, FAA No. 84-78. Certainly,

petitioner is entitled to rely upon findings by the Board that certain events affecting substantial numbers of controllers, which negated the sufficiency of the notice of leave cancellation, took place at his and other facilities.

4. Mobil Oil Corp. v. FPC 417 U.S. 283, 309-310 (1974) (cited by respondent on p. 6 of its brief) is inapplicable since there is no basis for determining whether the court of appeals "misapprehended or grossly misapplied", or even applied, the substantial evidence test. Its one sentence opinion did not discuss the substantial evidence test or any other test defined in 5 U.S.C. §7703(c) (Pet. p.3). In fact, the opinion gives no indication that the court reviewed the record in accordance with the mandate of that section.

5. Respondent's attempt to distinguish Carpenter, Benson, Coleman and Ailes (pp. 6-7 of its brief) is unavailing. Each of those cases found the June 16 memorandum to be insufficient notice since there was no evidence that the controller had actually read the memorandum and/or because it was issued more than a month prior to the controller's leave. Moreover, it is not true that petitioner never alleged facts similar to Benson (respondent's brief p. 7). Petitioner's adverse action file contained the same telegram that was referred to in Benson, i.e. that he was to report for duty on his scheduled shift. Petitioner's next scheduled shift was August 13, 1981 and he was discharged for not reporting to work on August 6, 1981.

Respondent contends, (Resp. brief p. 7, fn. 5) that there is no showing that

for the employees in the four similar cases "the same evidence of strike participation was available". There was not one shred of evidence of strike participation by petitioner. It is also not true, as contended in the same footnote, that the FAA never recognized "implicitly" or otherwise, that a notice in the read and initial binder was "insufficient". As the Board states in Ailes, at fn. 4, "the fact that the agency issued the order of July 31 [when petitioner was already on vacation] tends to weaken its argument that it depended on the July 16 order to establish cancellation of annual leave at the time of the strike in August".

INTERVENING MATTER NOT AVAILABLE AT THE TIME OF FILING OF PETITION

On December 5, 1985, a motion was made in the Court of Appeals for the Federal Circuit to gain compliance with the court's own rules relating to the

assignment of judges. The motion set forth facts of which petitioner was previously unaware, showing that all of the approximately 100 appeals in air traffic controllers' cases have been assigned to one of two 3-judge panels made up of the original lead case judges[3] and a senior judge. The motion, although unopposed was denied on December 17, 1985 and a motion for in banc review was made on January 10, 1986. That motion, also unopposed, is still pending. (White v. Department of Transportation, FAA, No. 85-1503)

There are serious questions as to the validity of any decision made by an improperly constituted panel. 28 U.S.C. § 46(b) requires that the Court of Appeals for the Federal Circuit "determine by rule a procedure for the rotation of judges from panel to panel to ensure that all of the

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3. The issues in this case were not addressed in the lead cases.

judges sit in a representative cross section of the cases heard". Pursuant to such requirement CAFC Rule 3(b) provides that "Assignment of cases to panels will be made so as to provide each judge with a representative cross section of the cases heard by the court". Section 20 of the court's Procedural Handbook states that the purpose of the varied assignments is "designed to ensure opportunities for each judge to sit with all other judges, that each judge sits in all type of cases, and that both the appearance and the fact of presentation of particular cases to particular judges is avoided."

When a case is heard by an improperly constituted panel, the judgment must be vacated and the case remanded and reconsidered with a properly constituted panel. United States v. American Foreign Steamship Corp. 363 U.S. 684 (1960);

Uzzel v. Friday 625 F. 2d 1117, 1120-1121 (4th Cir. 1980; in banc), cert. denied 466 U.S. 95 (1980).

Respectfully submitted,

Joan Stern Kiok
Counsel for Petitioner
32 Broadway - Suite 1800
New York, New York 10004
(212) 635-0700

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February 3, 1986